No. 78-349

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY HELSTOSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-33a) is reported at 576 F.2d 511. The opinion of the district court (App. D, *infra*, pp. 38a-62a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 34a-35a) was entered on April 13, 1978.

The order of the court of appeals denying the government's petition for rehearing was entered on June 30, 1978 (App. C, *infra*, p. 36a). On July 25, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including August 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause bars the government from introducing, in the bribery trial of a former Congressman, any evidence that, although not a legislative act, refers to the defendant's past performance of a legislative act.

2. Whether the voluntary giving of testimony and production of documents before a grand jury by a Congressman who is aware of but does not invoke the Speech or Debate Clause privilege constitutes a waiver of that privilege with respect to use of those documents and that testimony at the trial of an indictment returned by the grand jury, when there has been no express authorization by the Congressman of such use.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the Constitution provides in pertinent part:

> * * * for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.

18 U.S.C. 201 provides in pertinent part:

> (a) For the purpose of this section: "public official" means Member of Congress * * *
>
> * * * * *
>
> "official act" means any decision or action on any * * * matter * * * which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.
>
> * * * * *
>
> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act * * * [shall be guilty of an offense].
>
> * * * * *
>
> (g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; * * * [shall be guilty of an offense].

STATEMENT

A. The Pre-Indictment Proceedings

The indictment in this case grew out of a series of grand jury investigations in New Jersey inquiring

into corruption in connection with private immigration legislation (App. A, *infra*, p. 5a). These investigations continued for a number of years and have resulted in several indictments and convictions, including those of respondent's former administrative assistant and his brother (*ibid.*). During the investigations, respondent appeared before eight different grand juries on ten separate occasions from April 1974 until May 1976 (*ibid.*). Respondent voluntarily testified before those grand juries about his introduction of private immigration bills. He described in detail his motives for introducing the bills, the procedures by which he presented the bills in the House of Representatives, and the procedures used by his office to deal with private bill requests. He also testified regarding his own purported investigations of charges of fraud and bribery touching the private immigration bills (*ibid.*; C.A. App. 830-863, 944-967).[1] In addition, respondent produced for the grand jury voluminous files relating to the private bills, which included correspondence and copies of the bills themselves. He also testified and produced documents referring to the private bills when he appeared as a defense witness in the trial of his former administrative aide, Albert DeFalco, in October 1975 (App. A, *infra*, pp. 5a-6a).[2]

[1] "C.A. App." designates the five volume appendix filed by the United States in the court of appeals.

[2] DeFalco was convicted of bribery offenses in connection with private immigration legislation and sentenced to a six-year term of imprisonment. *United States* v. *DeFalco*, D., N.J., Crim. No. 75-264, decided October 17, 1975, affirmed, 546 F.2d 419 (C.A. 3), certiorari denied, 430 U.S. 965.

Prior to his first grand jury appearance in April 1974, and on each subsequent appearance, the government advised respondent that he could refuse to answer questions if he believed that to do so might incriminate him. (App. A, *infra*, p. 6a). The government also warned him that he was not under any compulsion to produce documents:

> Of course you understand that if you wish not to present those documents you do not have to and that anything you do present may also, as I have told you about your personal testimony, may be used against you later in a court of law?

C.A. App. 697. To this respondent replied:

> I understand that. Whatever I have will be turned over to you with full cooperation of this Grand Jury and with yourself. * * * I promise full cooperation with your office, with the F.B.I. [and] this Grand Jury. * * * As I indicated, I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances.

C.A. App. 697, 699. It was not until respondent's final appearance before the grand jury, in May 1976, that he asserted a Speech or Debate Clause privilege and refused to answer further questions (App. A, *infra*, p. 6a).

B. Proceedings in the District Court

In June 1976 the grand jury returned an indictment against respondent and three members of his congressional staff. Count I of the indictment charged respondent with conspiracy to violate the official bribery statute, 18 U.S.C. 201(c)(1), by acting with others to solicit and receive bribes in return for being influenced to introduce private immigration bills in the House of Representatives. Counts II through IV charged respondent with substantive violations of the bribery statute, alleging that he agreed to receive payments from specified aliens residing illegally in the United States in return for being influenced to introduce private bills in their behalf (App. D, *infra*, p. 39a).[3]

Respondent thereafter moved to dismiss Counts I-IV of the indictment on the ground that they infringed the Speech or Debate Clause. The district court denied respondent's motion to dismiss but held that the Speech or Debate Clause prohibited the government from proving during its case-in-chief the performance by respondent of any past legislative act (App. D, *infra*, pp. 43a-47a, 59a-62a). The government then filed a motion *in limine* seeking specific rulings on whether its proffered evidence, including the legislative files of respondent and the expected oral testimony of certain witnesses, would be admissible at trial. The government argued that respondent

[3] The remaining counts of the twelve-count indictment charged respondent with perjury before the grand jury and obstruction of justice.

had waived his Speech or Debate Clause privilege by his extensive prior disclosures before the grand jury and further contended that its evidence could be admitted without infringing the Speech or Debate Clause because it was offered only to prove respondent's knowledge and purpose in agreeing to accept the bribes.[4]

The district court found that respondent's disclosures before the grand jury had been voluntary and also found that he was aware of the availability of the Speech or Debate Clause privilege when he testified and produced the documents (App. D, *infra*, pp. 48a n. 4, 49a). The district court nonetheless concluded that respondent had not waived his privilege because "[s]uch a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts" (*id.* at 58a). Without ruling on each item of evidence proffered by the government, the district court

[4] The evidence proffered by the government included a narrative offer of proof setting forth the expected testimony of various witnesses in support of each allegation of bribery and conspiracy. The evidence also included more than 200 documents obtained from the files produced by respondent. The district court and the court of appeals ordered these materials placed under seal to protect respondent's right to a fair trial. In this Court, we have filed under seal a special appendix (referred to hereinafter as "Sp. App."), a copy of which has been served on respondent's counsel, containing the government's offer of testimony and also containing representative examples of the documents from respondent's files that were offered in the district court.

also decided that "the Government may not, during its case-in-chief, introduce evidence, derived from any source and for any purpose, of the past performance of a legislative act by defendant Henry Helstoski" (*id.* at 62a).

C. The Decision of the Court of Appeals

On appeal, the Third Circuit affirmed the district court's ruling.[5] In analyzing the scope of the evidentiary privilege, however, the court of appeals went beyond the district court, concluding that the Speech or Debate Clause prohibits the government from introducing any evidence *referring* to a past legislative act:

> The [Supreme] Court has been clear in its prohibition of "any showing" of legislative acts * * *. Legislative acts may not be shown in evidence for any purpose in this prosecution.
>
> Nor may the Government circumvent this clear requirement by introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts of the defendant. To allow a showing by such secondary evidence could render *Brewster's* [*United States* v. *Brewster*, 408 U.S. 501] absolute prohibition meaningless. * * * To allow proof of legislative acts in such a manner would reduce drastically the effectiveness of the Speech or Debate provision, and would discourage the dissemination to the public of information about legislative activities.

App. A, *infra*, pp. 28a-29a.

[5] Respondent sought mandamus in the court of appeals to review the district court's refusal to dismiss the indictment. The court of appeals denied this relief (App. A, *infra*, pp. 9a-21a), and we of course do not seek review of that part of the court of appeals' decision.

The court of appeals also refused to find a valid waiver in this case despite its recognition that respondent had testified and produced documents voluntarily and with specific knowledge of his right to assert the privilege. The court concluded that, if the privilege could be waived at all, any waiver "must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member" (*id.* at 32a).

D. Further Proceedings

Following the decision of the court of appeals, a pretrial conference was held in the district court on August 3, 1978. At this conference the district court declined the government's request to rule in advance of trial on the admissibility, under the court of appeals' decision, of specific items of proffered evidence. The court stated that it would exclude any item of evidence that contained any reference to or would afford any basis for inferring the performance of a past legislative act; the court also indicated that it would exclude evidence of payments of money to respondent subsequent to any legislative act, on the theory that the jury might infer from proof of such payments that respondent had fulfilled his part of the illegal bargain by performing legislative acts.[6]

[6] In the Special Appendix submitted herewith we have indicated the portions of the government's offer of proof that

REASONS FOR GRANTING THE PETITION

Bribery prosecutions of present or former Members of Congress are, fortunately, not commonplace occurrences. When such cases arise, however, they are of an importance disproportionate to their numbers. Moreover, because of the Speech or Debate Clause, prosecutions of federal legislators give rise to unique legal issues regarding the nature and scope of the privilege that the Clause confers.

Because of the importance of prosecutions such as the instant one, it is vital that the constitutional ground rules under which they are conducted be delineated with clarity and that the basic governing principles be set down by the highest court of the land. To date, only two such cases have been decided by this Court: *United States* v. *Brewster*, 408 U.S. 501; *United States* v. *Johnson*, 383 U.S. 169. *Johnson* established that a prosecution could not be sustained when the gravamen of the offense charged was the giving of a speech on the floor of the House, and the charge was proved by a searching inquiry into the preparation of and motives for the speech. *Brewster* established that the Speech or Debate Clause does not bar the prosecution of a charge of receiving a bribe for the performance of a legislative act, so long as the offense could be shown without direct proof of a legislative act. While much of importance was settled by these decisions, neither required a searching examination of the precise scope and con-

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we believe will be excluded at trial on the basis of the court of appeals' decision as construed by the district court.

tent of the evidentiary privilege that accompanies the immunity conferred by the Speech or Debate Clause, and questions of critical importance remain to be settled.

The instant case, we submit, requires consideration by this Court of this important and largely unresolved area. As the district court observed, "the issues presented are of constitutional moment, not only for this case but far beyond it * * *" (App. D, *infra*, p. 41a n. 3). As we set forth more fully below, the position adopted by the court of appeals represents a very expansive view of the privilege—a view that would bar virtually all evidence of relevant events occurring subsequent to the performance of a legislative act. This view would render effective bribery prosecutions of present or former Members of Congress virtually impossible in a large proportion of cases. While we acknowledge that the court of appeals' expansive interpretation of the privilege finds some support in language in the *Brewster* opinion, we submit that the language falls far short of compelling the result reached, and indeed that the principles reflected in *Brewster* and other Speech or Debate Clause cases in fact appear to support admission rather than exclusion of evidence of the type proffered by the government in this case.

In addition, this case presents a related issue of substantial importance regarding the ability of a Member of Congress to waive the evidentiary privilege of the Clause as to materials that otherwise would be inadmissible, and the standards by which the existence and effectiveness of a waiver are to be

assessed. The court of appeals has adopted a standard for waiver virtually unparalleled in stringency elsewhere in the law. The importance of the waiver issue also outstrips the boundaries of the present case, since Members of Congress, as well as prosecutors conducting grand jury investigations, need to know whether the privilege may be waived and, if so, what constitutes an effective waiver.

A. Under the decision of the court of appeals, the prosecution is precluded not only from proving the actual performance of a legislative act, but also from introducing any evidence that refers to the past performance of a legislative act. We believe that this ruling misconstrues the nature of the evidentiary privilege conferred by the Speech or Debate Clause and threatens needless injury to the government's ability to protect the integrity of the legislative process by means of prosecutions under 18 U.S.C. 201 for bribery.

1. The court of appeals has created, in effect, a relatively simple benchmark for assessing the admissibility of evidence in a bribery prosecution of a Member of Congress: evidence showing conversations and actions that precede the performance of a legislative act is admissible; evidence that reflects the occurrence of a past legislative act is inadmissible. Whatever virtues of simplicity such an approach may enjoy, we believe this chronological distinction does not reflect the proper standard for implementing the evidentiary privilege of the Speech or Debate Clause.

To illustrate, the court of appeals would allow the government to offer evidence of statements of the

following kind: "This afternoon I will introduce a private immigration bill in exchange for the $500 that you gave me." But the opinion forbids introduction of statements nearly identical in substance occurring only a few hours later: "I introduced a private immigration bill this afternoon, and I want the $500 that you promised in exchange."[7] Neither statement itself constitutes a legislative act. Forbidding proof of the second statement, while admitting proof of the first, will not advance the goal of congressional independence emphasized by the court of appeals. Neither statement "impugns" or "questions" an act of Congres or "inquires into" the legislative motivation of the Member. Both statements are manifestations of an illegal bribery agreement, and it is that bribery agreement, not the legislative act, that is the subject of inquiry.

Nor is it reasonable to conclude that the second statement, more than the first, invites the jury to infer that a legislative act has actually occurred. The statement of intent to perform a legislative act gives rise to an inference that it occurred, just as a statement of recollection supports such an inference. See

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[7] By precluding any evidence that refers to a past legislative act, the court of appeals has adopted a rule with sweeping implications. Conversations of third parties in furtherance of the bribery conspiracy are often banned. The government apparently cannot even prove that the Congressman received bribes (see p. 9, *supra*) because such receipt is an indirect showing of a past legislative act. Even outright admissions of guilt—"I took a bribe for introducing the bill"—would be precluded by the court's ruling. The consequences of the rule for the present prosecution are shown in the Special Appendix to this petition.

Mutual Life Ins. Co. v. *Hillmon*, 145 U.S. 285, 296; *United States* v. *Annunziato*, 293 F.2d 373, 377 (C.A. 2). In sum, the Third Circuit's ruling makes the admission of evidence turn entirely on the fortuitous timing of the conversations and non-legislative actions of the bribery conspirators, not upon the policies that underlie the Speech or Debate Clause.

The Third Circuit's rule of privilege effectively precludes the admission in this prosecution of substantial portions of the government's proof and, more generally, would result in arbitrary protection for corrupt legislators who are lucky enough (or shrewd enough) to structure their participation in the bribery scheme so that their conversations occur after the legislative performance. In cases such as the present case, where an administrative aide makes initial contact with the potential briber, and the Congressman deals with the briber only after the performance of the legislative act in order to demand or receive payment, there may be insufficient evidence arising before the legislative act to establish that the Congressman was a knowing participant in the illegal scheme. To bar conversations referring to past legislative acts, or, worse, evidence, such as payments of money, that indirectly suggests the occurence of such acts, will make it impossible to obtain convictions in this category of cases.

2. Although the court of appeals believed that its holding was warranted by this Court's decisions in *Johnson* and *Brewster*, and although there are isolated statements in those opinions that look in the direction of the result reached by the court of appeals,

we submit that analysis of this Court's Speech or Debate Clause decisions demonstrates that they do not support that result, but in fact lead to the opposite conclusion—that the evidence described in the government's offer of proof is admissible. Our argument in support of admissibility focuses on the following factors: (1) the acts and conversations in question occurred outside of the congressional sphere and were not part of the due functioning of the legislative process; thus there is no question here, as there was in *Johnson*, of direct proof of a legislative act privileged under the Clause; (2) the evidence is sought to be introduced for the legitimate purpose of proving respondent's state of mind and guilty knowledge in accepting money, and any references to the occurrence of past legislative acts are incidental; (3) proof of the conversations and other occurrences would not "draw into question" or "impugn" any legislative act or "inquire into" respondent's motives therefor.

a. In *Brewster* this Court held that the government could prove that the defendant Congressman had received bribes for the past performance of legislative acts, in violation of 18 U.S.C. 201(g).[8] The Court held that, with respect to such past legislative acts, the government was free to "show that [Senator Brewster] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act." 408 U.S. at 527. The Court confirmed that "an inquiry into the pur-

[8] 18 U.S.C. 201(g) prohibits, *inter alia*, the receipt of bribes "for or because of any official act *performed* * * * by [the Congressman]" (emphasis supplied).

pose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' " *Id.* at 526. The Court added that "evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury." *Id.* at 527.

This aspect of the *Brewster* decision would be untenable if the court of appeals' chronological criterion for admissibility were sound. The dissenting Justices in *Brewster* were of the view that the Speech or Debate Clause prohibited all prosecutions under Section 201(g) because the government would of necessity have to make reference to the legislation for which the bribe was received. Evidence of the payment of money would not be intelligible (indeed, would not be relevant) without such a reference. See 408 U.S. at 535-536, 553. The necessity of making such a reference, however, did not alter the holding of the majority in *Brewster*.[8a]

b. *Brewster* further establishes that the Speech or Debate Clause "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative

[8a] Here, as in *Brewster*, it is not an element of the offense to show that the legislative acts for which the payments were accepted actually occurred. For example, if a Member of Congress accepts a bribe for having influenced others to vote for or against a particular measure, it is immaterial under the statute whether he actually exerted such efforts or whether they were effective. Therefore, it is not his legislative acts that are called into question by a prosecution under either Section 201(g) or Section 201(c)(1). See 408 U.S. at 526-527.

process itself." 408 U.S. at 528. For this additional reason, the government should be allowed to inquire into respondent's private conversations, even though such conversations may refer in some manner to legislative activities. Such an inquiry is permissible because "the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *Id.* at 512. The Court also reminded:

> In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process. [408 U.S. at 515-516; footnotes omitted].[9]

[9] The Third Circuit placed principal reliance on language in *Brewster* indicating that *United States* v. *Johnson, supra,* "precludes any showing of how [the Congressman] acted, voted, or decided." 408 U.S. at 527. But while "[i]t is true that the quoted words appear in the * * *opinion, [the court of appeals] takes them out of context." *Brewster, supra,* 408 U.S. at 513. In *Johnson* "the Government questioned [the Congressman] extensively * * * concerning the authorship of the speech, and his motives for giving the speech." The theory of the government's case in *Johnson,* and the focus of its evidence, was the Congressman's improperly motivated speech. See 408 U.S. at 510. Inquiry into the private conversations that furthered the bribery conspiracy in this case cannot be compared to the examination of legislative conduct forbidden in *Johnson.* The holding in *Johnson* was a narrow one, and should not be stretched to the very different facts presented here: "We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us." 383 U.S. at 185.

Because the Speech or Debate Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process" (*id.* at 517), and because "[t]aking a bribe is, obviously, no part of the legislative process" (*id.* at 526), evidence of conversations about the giving and receiving of bribes should not be precluded at trial.[10] The correct approach, in our view, is stated in *United States* v. *Garmatz*, 445 F. Supp. 54, 64-65 (D. Md.):

> [D]iscussions relating to the giving or receiving of a bribe would not be barred at the trial, nor conversations of co-conspirators which might be casually or incidentally related to legislative affairs. * * * The question before this Court when the proffers are made will be whether the government is seeking to introduce direct evidence of the performance of a legislative act as that term was defined in *Brewster* * * * not whether the legislative act in question was performed in the past or in the future.

c. The Third Circuit reasoned that the conversations here involved must be precluded because their use might "discourage the dissemination to the public of information about legislative activities" (App. A, *infra*, p. 29a). But this Court has twice held that even communications having a colorable claim to legitimacy (unlike the conversations of the bribery conspirators here; see, *e.g.*, Sp. App. 6) are not protected by the Speech or Debate Clause if they occur outside of the halls of Congress. In short, mere references to legislative acts have not sufficed to foreclose judicial inquiry.

Thus, in *Gravel* v. *United States*, 408 U.S. 606, 625-629, this Court held that the Speech or Debate Clause did not forbid inquiry into the publication of the contents of the record of a congressional hearing. Far from forbidding any reference to legislative action, this Court stated: "If it proves material to establish for the record the fact of publication [of the Pentagon Papers] at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose." 408 U.S. at 629 n. 18. And in holding that the grand jury could inquire into the subsequent dissemination of these materials, the Court noted (*id.* at 625):

> Here, private publication by Senator Gravel * * * was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence.

As in *Gravel*, the communications that the government here seeks to inquire into occurred outside of the halls of Congress, and the fact that the inquiry may indirectly suggest that certain events occurred in Congress is not fatal because no examination of the legislative performance is required. See also *Doe* v.

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[10] By enacting 18 U.S.C. 201, Congress has "deliberately delegated * * * to the courts" the function of punishing bribery occurring in its ranks, and the congressional prohibition extends to bribes received in payment for past legislative acts. See *United States* v. *Brewster*, *supra*, 408 U.S. at 525, 527. No decision of this Court has barred "a prosecution which, though possibly entailing some reference to legislative acts, is founded upon a 'narrowly drawn' statute passed by Congress in the exercise of its power to regulate its Members' conduct." *United States* v. *Brewster*, *supra*, 408 U.S. at 510. See also *United States* v. *Johnson*, *supra*, 383 U.S. at 185.

McMillan, 412 U.S. 306, 313-318, holding that the dissemination of official congressional committee reports outside of Congress could be inquired into, even though such inquiry would inevitably show that the Committee had issued a report and would show the contents of that report.[11]

In sum, this Court's decisions in *Brewster*, *Gravel* and *Doe* establish that while "a congressman is immune from questioning about his speeches, debates and votes," he may be accountable for "telling the people" outside of Congress "why he spoke and voted as he did." Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1163 (1973). The holding of the Third Circuit here, barring proof of conversations occurring outside of the legislative sphere, thus conflicts with the teachings of this Court's recent decisions.

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[11] In *Doe*, the defendants (including a number of Congressmen) were charged with invasion of privacy by reason of their public distribution of a report that stated on its face that it was an "Investigation and Study of the Public School System of the District of Columbia (Report of the Committee on the District of Columbia, House of Representatives), H.R. Rep. No. 91-1681, 91st Cong., 2d Sess." See *Doe* v. *McMillan*, 459 F.2d 1304, 1307 n. 2 (C.A.D.C.). Merely glancing at the report that was the subject of the controversy would reveal to the jury a past legislative act. Although the Congressmen in *Doe* were absolved because they had not participated in the public distribution, it is clear from the Court's opinion that "[i]nasmuch as the printing and distribution of committee reports to the general public were unprotected external communications, even the members of Congress would not have protection if they personally engaged in the performance of such acts." Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 Suffolk U. L. Rev. 1019, 1039 (1974).

B. Respondent voluntarily produced for the grand jury a number of documents that the prosecution now seeks to introduce in evidence at trial.[12] He did so with knowledge that he could withhold them and assert his privilege under the Speech or Debate Clause (App. D, *infra*, pp. 48a-49a), and after having been advised that the documents could be used against him in a criminal prosecution (App. A, *infra*, p. 6a). On each occasion that respondent appeared before the grand jury, he was represented by experienced counsel who had also represented him in a prior case in which respondent did assert the Speech or Debate Clause privilege (App. D, *infra*, p. 48a n. 4). Despite his opportunity to assert the privilege, respondent pledged full cooperation with the government and the grand jury and expressly asserted that "I come with no request for immunity * * *" (C.A. App. 699). Respondent and his counsel sought a tactical advantage by voluntarily producing the requested documents and testifying before the grand jury. By this cooperation, respondent sought to free himself of suspicion, stating to the grand jury that he had taken vigorous steps to investigate and "ferret out" bribery and corruption (C.A. App. 830, 834-836, 944-948).

By declining to find a waiver of the privilege in these circumstances, the Third Circuit departed from

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[12] The vast majority of these documents were copies of letters sent by respondent to persons seeking private immigration legislation (Sp. App. 12-17, 21-25). Copies of bills introduced by respondent were also produced (Sp. App. 13-14). We assume, *arguendo*, that these documents constitute legislative acts that could not be proved without violation of the Speech or Debate Clause in the absence of a waiver of the privilege of the Clause.

the holding of the Seventh Circuit in *United States* v. *Craig*, 528 F.2d 773, 780-781.[13] And by requiring an express waiver for the precise purpose that the evidence is sought to be used—and concluding that respondent's voluntary production under the circumstances did not satisfy that standard—the court of appeals has for all practical purposes eliminated the possibility of waivers of the privilege.[14]

The resolution of the waiver question raises an important issue of constitutional law of continuing signifiance in bribery prosecutions that merits review by this Court. Members of Congress appearing before grand juries should be able to predict whether their testimony and production of documents amounts to a waiver of the Speech or Debate Clause privilege, and government attorneys conducting such investigations are also entitled to authoritative guidance in deter-

[13] *Craig* held that a state legislator could waive his speech or debate immunity by testifying voluntarily before the grand jury. Although the Seventh Circuit dealt with a state legislator, its analysis rested upon this Court's decisions under the federal Speech or Debate Clause. The Seventh Circuit, sitting *en banc*, subsequently vacated the original panel decision on other grounds. 537 F.2d 957. The waiver holding was thereby mooted, but never questioned or set aside.

[14] Short of a written declaration of waiver, formally renouncing the privilege as to each intended use of each item of evidence, it is difficult to determine what would satisfy the Third Circuit's standard. This Court has recently described the "knowing and intelligent waiver" standard as "extraordinary" in nature. *Garner* v. *United States*, 424 U.S. 648, 657. By refusing to give effect even to a knowing and intelligent waiver here, the Third Circuit has surpassed even the exacting standard that this Court has reserved for cases involving waivers of rights central to the integrity of the trial process.

mining what is required to accomplish a valid waiver of the privilege.

Although there is little explicit authority on the waiver issue, the Speech or Debate Clause privilege is generally recognized to be a personal privilege available to individual congressmen to safeguard their independence. *Coffin* v. *Coffin*, 4 Mass. 1, 27 (Sup. Ct.); *In re Grand Jury Proceedings*, 563 F.2d 577, 582 (C.A. 3); *Powell* v. *McCormack*, 395 U.S. 486, 505; see also *United States* v. *Brewster*, *supra*, 408 U.S. at 547 (Brennan, J., dissenting). Congressmen may therefore waive the personal privilege, as this Court stated in *Gravel* v. *United States*, *supra*, 408 U.S. at 622 n. 13.[15] Applying the teaching of *Gravel*, the Seventh Circuit concluded both that the privilege could be waived and that the appropriate waiver standard was simple "voluntariness." The waiver in this case, which was both voluntary and intelligent, is more than sufficient to satisfy the standard prescribed in *Craig*.

The waiver standard applicable to a particular constitutional guarantee depends upon the purpose of that guarantee. See *Schneckloth* v. *Bustamonte*, 412

[15] In enacting the official bribery statute, 18 U.S.C. 201, Congress has promulgated a narrow provision punishing bribery by its members and has deliberately delegated the trial function to the courts. *United States* v. *Brewster*, *supra*, 408 U.S. at 525. The statute condemns bribes for past legislative performances as well as future performances. Nothing in the statute suggests that Congress, as an institution, has withheld consent to examine relevant evidence of the bribery offenses denounced by it.

U.S. 218, 235-237, 241-246; *Garner* v. *United States*, 424 U.S. 648, 653-658. A waiver standard stricter than necessary to serve the purpose of the guarantee, however, is not appropriate. *Ibid.* The Speech or Debate Clause serves a number of important purposes, but none of them necessitates the extraordinary waiver standard fashioned by the Third Circuit here. The Clause protects legislators from distraction from the performance of their legislative duties that may result from litigation (*Powell* v. *McCormack*, 395 U.S. 486, 505); it also protects Congressmen from questioning and punishment for their legislative acts (*United States* v. *Johnson*, *supra*, 383 U.S. at 180); and it protects the integrity of the legislative process by insuring the independence of individual legislators (*United States* v. *Brewster*, *supra*, 408 U.S. at 507).

A Congressman wishing to avoid the distraction of defending himself, to avoid inquiry into his legislative acts, and to assert his independence as a legislator is free to do so by claiming the privilege in appropriate cases. Had respondent desired to claim the protections of the Speech or Debate Clause, he could have done so, and accordingly no value implicit in the Clause is impaired by giving recognition to his knowing and voluntary relinquishment of those personal protections. To permit a Congressman to attempt to gain a tactical advantage by disclosing relevant documents, and then to withdraw them after his strategy has failed, would defeat the ends of criminal justice without contributing to the independence of the legislature that the Speech or Debate

Clause was intended to secure. See *United States* v. *Nixon*, 418 U.S. 683, 708-709; *United States* v. *Nobles*, 422 U.S. 225, 230-231, 239-240.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

ANDREW L. FREY,
Deputy Solicitor General.

STEPHEN M. SHAPIRO,
Assistant to the Solicitor General.

AUGUST 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1423

UNITED STATES OF AMERICA, APPELLANT

v.

HELSTOSKI, HENRY

(D.C. Crim. No. 76-201-1, D. of N.J.)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

No. 77-1800

HENRY HELSTOSKI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

HONORABLE H. CURTIS MEANOR,
United States District Judge, NOMINAL RESPONDENT

ON PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION

Argued October 6, 1977

Before SEITZ, *Chief Judge*, STALEY and HUNTER,
Circuit Judges.

OPINION OF THE COURT

(Filed April 13, 1978)

SEITZ, *Chief Judge.*

Henry Helstoski ("defendant"), a former United States Congressman, petitions for a writ of mandamus to compel the district court to dismiss Counts I-IV of a pending indictment against him. He seeks dismissal on the grounds, inter alia, that those counts contravene the Speech or Debate Clause of the United States Constitution. That Clause provides that "[t]he Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place." *U.S. Const.* art I, § 6.

In a separate appeal arising from this prosecution of defendant, the Government challenges a pretrial order of the district court forbidding the Government to introduce during its case-in-chief "evidence of the performance of a past legislative act on the part of the defendant, Henry Helstoski, derived from any source and for any purpose." *United States* v. *Helstoski*, No. 76-201 (D. N.J., Feb. 23, 1977) (pretrial order).

The defendant was indicted along with several other persons in June of 1976 by a grand jury in New Jersey. At the time of the indictment, and at all times during which the indictment charged that the defendant violated the law, the defendant was a Member of Congress representing the Ninth Congressional District in New Jersey.

Count I charges the defendant with violation of the conspiracy statute, 18 U.S.C. § 371 (1976). The count alleges that while he was a Member of Congress the defendant conspired to violate the official bribery statute, 18 U.S.C. § 201(c)(1),[1] by acting with others to solicit and obtain bribes from resident aliens in return for being influenced in the performance of official acts to benefit those aliens.

The conspiracy count defined the official acts for which bribes allegedly were paid to defendant as being "the introduction of private bills in the United

---

[1] 18 U.S.C. § 201 (1976) provides in pertinent part:

> (a) For the purpose of this section:
>
> "public official" means Member of Congress . . . ; and
>
> . . . .
>
> "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.
>
> . . . .
>
> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States;
>
> . . . .
>
> Shall be [guilty of an offense].

States House of Representatives." In addition, four of the sixteen overt acts set out in Count I alleged that the defendant introduced specific bills into the House to benefit specific individuals. For example, Overt Act 13 charged that "[o]n or about September 6, 1973, the defendant, HENRY HELSTOSKI, introduced a private bill in the United States House of Rep-representatives for Luis and Maria Echavarria."

Counts II-IV charged the defendant with substantive violations of 18 U.S.C. §§ 201(c)(1) & (2) (1976).[2] Each count alleged that while a Congressman the defendant solicited and agreed to receive payments from specified aliens in return for being influenced in the performance of official acts. Each count specified the official acts at issue. For example, Count IV charged:

> From on or about January 11, 1975, to on or about January 18, 1975, in East Rutherford, New Jersey, the defendant, HENRY HELSTOSKI, directly and corruptly asked, demanded, solicited, sought and agreed to receive cash payments from Luis and Maria Echavarria in return for his being influenced in the performance of an official act, to wit: the introduction of a second private bill in the United States House of Representatives on behalf of Luis and Maria Echavarria, which private bill was introduced by the defendant, HENRY HELSTOSKI, on January 27, 1975.

---

[2] See note 1, *supra*.

This indictment grew out of a complex investigation by several federal grand juries in New Jersey into allegations of political corruption and fraud in immigration matters. These investigations continued for several years, and thus far have resulted in several indictments and convictions, including those of the defendant's former administrative assistant and the defendant's brother.

During these investigations the defendant appeared before eight different grand juries on ten separate occasions from April of 1974 until May of 1976. He testified and produced documents both voluntarily and in response to subpoena. That testimony and those documents concerned a variety of issues, including the defendant's personal finances and spending habits, as well as concerning the introduction of private bills by the defendant.

The defendant testified before these grand juries voluntarily and in detail about his introduction of private immigration bills. He described his motive for introducing the bills. He testified about the procedures by which he presented the bills to the House and to the proper committees, and he detailed how his office dealt with private bill requests. He also testified about his own investigation into allegations of fraud in connection with the bills.

In addition the defendant produced for the grand juries voluminous correspondence and files relating to the private bills at issue. The documents produced by defendant included copies of the bills themselves.

The defendant also testified and produced documents about these private bills when he testified in the trial of his former administrative assistant, Albert DeFalco, on October 15, 1975.

Prior to his first appearance before a grand jury in April, 1974, and upon each subsequent appearance, the Government told the defendant that he could refuse to answer questions or produce documents if he believed that to do so might incriminate him. The Government warned him that any information he did offer could be used against him. Upon each occasion the Government also informed the defendant that he had the right to confer with legal counsel and that an attorney would be provided for him if he could not afford one.

At no time did the Government speak to the defendant about his rights under the Speech or Debate Clause. And though the district court found that when the defendant first appeared before the grand jury he knew of his Speech or Debate privilege as a result of other unrelated litigation,[3] it was not until the defendant's final appearance before the grand jury on May 14, 1976, that the defendant asserted his Speech or Debate Clause privilege in refusing to answer the grand jury's questions. The defendant did not testify about, or produce documents

[3] In *Schiaffo* v. *Helstoski*, 492 F.2d 413 (3d Cir. 1974), the defendant relied upon his Speech or Debate privilege in defending a civil suit alleging abuse of the franking privilege. The attorney who represented defendant in *Schiaffo* also represented him when he appeared before the various grand juries.

concerning, legislative acts subsequent to the May 14, 1976, assertion of privilege.

After the district court severed those eight counts in the indictment that named only Helstoski as a defendant, the defendant moved to dismiss Counts I-IV on the ground they contravened the Speech or Debate Clause in that they called legislative acts into question. Alternatively, the defendant sought dismissal on the ground that the indictment was invalid because the grand jury heard evidence in violation of the Speech or Debate Clause.

The Government opposed the motion on the grounds that the Speech or Debate Clause did not invalidate the indictment and that, in any event, the defendant had waived his Speech or Debate rights by voluntarily testifying before the grand jury.

The district court denied defendant's motion in a bench opinion. *United States* v. *Helstoski*, No. 76-201 (D. N.J., Feb. 1, 1977) (bench opinion). The court rejected the Government's waiver argument and it held that the indictment was not inconsistent with the Speech or Debate Clause. The court also held that the Speech or Debate Clause prohibited the Government from proving during its case-in-chief the performance of any past legislative act by the defendant.

The Government then filed a motion with the district court seeking specific rulings on whether 23 categories of evidence would be admissible at trial. The categories comprised evidence of actual bills in-

troduced by defendant, evidence of payments to defendant, and evidence of conversations and correspondence that referred to the introduction of the private bills at issue.

The Government renewed its waiver argument in support of these offers of proof. Alternatively, it urged the district court to find the offers admissible on the grounds they were offered to prove defendant's purpose and intent in agreeing to accept the bribe, and not offered to question legislative acts.

After oral argument on the Government's offer of proof the district court issued a written opinion. That opinion also set forth the court's prior oral rulings on defendant's earlier motion to dismiss. *United States* v. *Helstoski*, No. 76-201 (D. N.J., 22, 1977) (unpublished opinion). The court said again that it believed the indictment valid under the Speech or Debate Clause, and refused to dismiss the first four counts. The court repeated its holding that the defendant had not waived his privilege, since there had been no express waiver of the type the district court believed was required by the important principles supporting the Speech or Debate privilege.

In response to the Government's offer of proof the district court restated its prohibition on proving any past legislative acts. It found it unnecessary to rule specifically on any of the 23 proffered categories, but held the Speech or Debate Clause to be an absolute bar to the introduction into evidence of legislative acts for any purpose.

On February 23, 1977, the district court issued an order embodying its judgment on the motions before it. It denied the defendant's motion to dismiss, and stated the limitations on the presentation of evidence of legislative acts:

> The United States may not, during the presentation of its case-in-chief at the trial of the above Indictment, introduce evidence of the performance of a past legislative act on the part of the defendant, Henry Helstoski, derived from any source and for any purpose.

United States v. *Helstoski*, No. 76-201 (D. N.J., Feb. 23, 1977) (pretrial order).

The Government timely appealed from the February 23, 1977, order, asserting that this court has jurisdiction over the appeal under 18 U.S.C. § 3731 (1976). On June 17, 1977, the defendant petitioned this court for a writ of mandamus directing the district judge to dismiss the first four counts of the indictment. The cases were consolidated for disposition.

I.

Defendant's Petition for a Writ of Mandamus

The defendant invokes the jurisdiction of this court under the All Writs Act, 28 U.S.C. § 1651 (1970), seeking a writ of mandamus to compel the district judge to dismiss the four counts of the indictment charging defendant with agreeing to accept money in return for promising to perform legislative acts.

Defendant argues that his entitlement to the writ is clear. He argues that for the district court to try him on this indictment would violate the Speech or Debate Clause and thus would constitute a clear abuse of judicial power. In addition the defendant argues that since the Speech or Debate Clause protects against the burden of defending charges brought in violation of its provisions as well as against conviction for such charges, his rights under the Clause will be infringed if he is forced to defend against the indictment and then appeal from a post-verdict judgment. In these circumstances defendant believes that his right to issuance of the writ is clear and indisputable.

The Government, of course, does not agree. It argues that this Court is without jurisdiction to grant the writ since defendant merely seeks reversal of a routine refusal by the district court to dismiss counts of an indictment. In addition to opposing on the merits each justification asserted by defendant in support of the petition, the Government also argues that the petition should be denied as untimely, or else denied on the ground that defendant waived his Speech or Debate privilege by voluntarily testifying before the grand jury about his legislative acts.

A.

The All Writs Act empowers the Courts of Appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (1970).

The Act has been read to grant us jurisdiction to issue a writ of mandamus where the underlying proceeding is one either actually or potentially within our appellate jurisdiction. Since the prosecution of this defendant for the violation of federal bribery laws is a case potentially within our appellate jurisdiction, we have the jurisdiction to grant the writ defendant seeks. "Hence the question presented on this record is not whether [we have] power to grant the writ but whether in light of all the circumstances the case [is] an appropriate one for the exercise of that power." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 25-26 (1943).

The Supreme Court recently has emphasized that, in determining when it is "appropriate" to issue the writ we must keep in mind that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976).

Generally, federal courts have used the writ "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26 (1943), *quoted in Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). And while the Supreme Court in *Kerr* noted that it had "not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' " the Court stressed that the writ should issue

only in extraordinary situations: "the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' " *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976), *quoting Will* v. *United States*, 389 U.S. 90, 95 (1967).

In order to further the congressional determination that appellate review should come only after final judgment except in the most exceptional circumstances, the courts also have required that even where circumstances amount to a "judicial usurpation of power," the petitioner must satisfy certain other conditions for issuance of the writ. Thus, the party seeking the writ must have no other adequate means to attain the relief he seeks. And petitioner also must show that his right to issuance of the writ is clear and indisputable. *Id.* at 403.

Finally, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Id.*

In light of these principles we examine the grounds asserted by defendant in support of his petition in order to determine if issuance of the writ is appropriate in this case.

B.

Defendant first argues that the district court is without jurisdiction to try the defendant because the indictment charges him with legislative acts. Apparently, the defendant believes that the specific references to the introduction of private bills in the first four counts establish that this indictment is actually one charging the defendant with the performance of legislative acts and so violates the Speech or Debate privilege.

The defendant distinguishes this indictment from those at issue in *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Johnson*, 383 U.S. 169 (1966). Defendant asserts that in those cases the indictments did not charge specific legislative acts, and so did not require proof of such acts. In this case, however, the defendant believes that mention of specific legislative acts shows that the indictment charges him with the performance of legislative acts. This indictment, defendant argues, depends upon proof that the defendant introduced into the House of Representatives the specified private bills, and so depends upon proof of acts privileged against such inquiry under the Speech or Debate Clause.

We do not believe that the indictment at issue in this prosecution is materially distinguishable from that upheld by the Supreme Court in *Brewster*. In *Brewster*, four counts charged the defendant with violating 18 U.S.C. § 201(c) by agreeing to accept money in return " 'for being influenced . . . in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity.' " *United States* v. *Brewster*, 408 U.S. 501, 525 (1972). A fifth count charged Brewster with having agreed, in violation of 18

U.S.C. § 201(g), to accept money for official acts in respect to his action, vote, and decision on " 'postage rate legislation which had been pending before him in his official capacity.' " *Id.* at 527.

Though the *Brewster* Court recognized that the indictment charged the defendant with accepting bribes in connection with legislative acts themselves protected by the Speech or Debate Clause, it allowed prosecution under the indictment. It did so because neither the § 201(c) nor the § 201(g) charge required the proof of any specified legislative acts concerning the postage rate legislation to which the counts referred. The Court held that to make a prima facie case, all the Government was required to prove was the "corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act" under §§ 201(c) and (g). *Id.* at 526. (emphasis in original).

> Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that [Brewster] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527.

We think *Brewster* compels the conclusion that the indictment in the case before us does not violate the Speech or Debate Clause. The grand jury charged the defendant with conspiracy to violate and with violation of §§ 201(c)(1) & (2): to establish a prima facie case, the government need not show any of the legislative acts for which the defendant allegedly accepted payments. As the Court said in *Brewster*:

> The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that [the defendant] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Id. at 526.

Since the allegations of the indictment charge a crime even without reference to any acts protected from inquiry under the Speech or Debate Clause, defendant has not made sufficient showing to justify issuance of the writ he seeks on Speech or Debate grounds. In so holding we express no opinion as to whether, or in what circumstances, mandamus might be appropriate to prevent trial of an indictment the sufficiency of which is dependent upon proof of materials embraced by the Speech or Debate Clause.

C.

The defendant also argues that the district court's order prohibiting the introduction by the government

of any evidence of past legislative acts was an attempt by the district court to obtain jurisdiction over an indictment otherwise invalid under the Speech or Debate Clause. Defendant charges that in so modifying the proof to be permitted at trial the district court "constructively amended" the indictment, thereby depriving the defendant of his fifth amendment right to be tried only upon the indictment of a grand jury.

Though defendant is not entirely clear on this point, we understand him to argue that such a "constructive amendment" deprived the district court of jurisdiction and justifies issuance of the extraordinary writ he seeks.

Our cases have found a "constructive amendment" of the grand jury's indictment where the trial court "permitted, in the guise of a variance . . . [modification of] the facts which the grand jury charged as an *essential element* of the substantive offense." *United States* v. *Crocker*, 568 F.2d 1049, 1060 (3rd Cir. 1977) (emphasis added). Thus, "we must test to see whether there is reasonable assurance from the face of the indictment that the grand jury found probable cause on each of the essential elements which [will] underlie the verdict of the petit jury." *United States* v. *Goldstein*, 502 F.2d 526, 529 (3d Cir. 1974) (in banc).

The district court's evidential ruling in this case does not modify the proof of any essential elements of the crime with which the defendant is charged. *Brewster* makes it clear that proof of legislative acts

is not essential to a charge of official bribery under § 201(c). A prima facie case may be established under that statute without any showing of legislative acts on the part of the defendant. Accordingly, the district court's evidential limitation did not modify the proof of an essential element of the offense from that found by the grand jury.

In these circumstances, we do not believe that the district court's order constituted a "constructive amendment" of the indictment. The proofs supporting the essential elements of the crime charged have not been modified from those considered and found sufficient to support a finding of probable cause by the grand jury. The basic theory of the offense and the facts considered by the grand jury in charging that offense remain unaltered.

We thus do not believe defendant's "constructive amendment" argument entitles him to the writ of mandamus he seeks. In so holding we express no opinion as to whether or in what circumstances the "constructive amendment" of an indictment might justify issuance of such a writ.

D.

Defendant's final argument in support of his petition is that the district court is without jurisdiction to try the indictment because the grand jury that returned it heard evidence in violation of the Speech or Debate Clause. The district court rejected this argument, holding that "courts simply will not go

behind the face of an indictment, once it is returned, in order to test the competency of the evidence adduced before the grand jury." *United States* v. *Helstoski*, No. 76-201 at 4 (D. N.J., Feb. 22, 1977) (unpublished opinion).

Defendant argues, however, that presentation to the grand jury of evidence of defendant's legislative acts produced an indictment beyond the grand jury's power to return, and beyond the court's jurisdiction to try. Defendant apparently believes that the principle of separation of powers that supports the Speech or Debate privilege requires that the district court be prevented from even trying the defendant on this indictment.

The indictment, however, is valid on its face. It charges an offense for which defendant may be tried and convicted consistently with the principles of the Speech or Debate privilege.

Even in light of the expansive definition of "jurisdiction" that the Supreme Court has adopted in evaluating mandamus petitions, we do not believe that in these circumstances defendant's allegations concerning the grand jury make out " 'exceptional circumstances amounting to a judicial usurpation of power [so as to] justify the invocation of this extraordinary remedy.' " *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976), *quoting Will* v. *United States*, 389 U.S. 90, 95 (1967). We conclude that the district court has jurisdiction to try the indictment returned against the defendant in this

case, and accordingly refuse to grant the writ on grounds of grand jury abuse.

In *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943), the Supreme Court similarly refused a petition for a writ of mandamus. There the petitioner sought to quash an indictment on the grounds that the grand jury that returned it had no power to hear the subject matter presented to it, since the grand jury's statutory power to hear the allegations against petitioner had expired before it returned an indictment against him.

The Court noted that the case before it, unlike a situation where it was alleged that an indictment had been amended by the court, involved "no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment" was not implicated by the petition. *Id.* at 26. Moreover, the requisite number of duly qualified grand jurors had returned the bill. Accordingly, the writ was denied.

> The objection that the subject matter of the indictment was not one which the grand jury had been or could be continued to hear was at most an irregularity which, if the proper subject of a plea in abatement, did not affect the jurisdiction of the court.

Id. at 27.

Similarly, we do not believe defendant's allegations of grand jury abuse in this case question the jurisdiction of the court below. As established in *Costello* v.

United States, 350 U.S. 359 (1956), "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial of the charge on the merits." *Id.* at 363 (footnote omitted). Thus, we believe that in this case, the district court possesses jurisdiction to try the valid indictment returned by a competent grand jury. In such circumstances, we cannot hold that we must exercise our extraordinary powers under the All Writs Act to prevent a judicial usurpation of power.

Nor do we believe defendant's right not to be questioned for legislative acts will be lost by trial on this indictment. As we have decided, the Speech or Debate Clause does not bar trial of the defendant on these charges. Any argument that the important policies underlying the Clause require dismissal of an indictment returned by a grand jury that heard evidence in violation of the Clause's principles does not go to the jurisdiction of the district court, but to the proper means that this court should use to effectuate the Clause. As such, we believe it is an argument better left for decision on appeal from a final judgment.

We also note that it is far from "clear and indisputable" that defendant could prevail on his arguments that presentation to the grand jury of evidence in violation of the Speech or Debate Clause requires dismissal of the indictment. The Supreme Court consistently has refused to countenance challenges to the competency of evidence presented to a grand jury, holding that a valid indictment returned by a competent grand jury is enough to call for a trial. *United States* v. *Calandra*, 414 U.S. 338, 342-45 (1974).

Moreover, in *United States* v. *Johnson*, 383 U.S. 169 (1966), the Court allowed retrial of the conspiracy count even though it was clear from the specification of a legislative act in the overt acts supporting that conspiracy count that the grand jury heard the evidence that the Supreme Court held was barred at trial by the Speech or Debate Clause. And on appeal after the retrial, the Court of Appeals rejected Johnson's argument that the indictment was invalid because of the presentation of evidence of legislative acts to grand jury. *United States* v. *Johnson*, 419 F.2d 56, 58 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). *See United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966).

E.

Since we find that in the circumstances of this case it would not be appropriate for us to issue the extraordinary writ sought by defendant, we deny his petition. In light of this disposition, we need not reach the Government's argument that the petition should be dismissed as untimely. Nor need we address in this context the Government's argument that defendant waived his Speech or Debate privilege.

II.

The Government's Appeal

The Government has appealed to this court from that portion of the district court's order of February 23, 1977, holding that the "United States may not, during the presentation of its case-in-chief at the trial . . . introduce evidence of the performance of a past legislative act on the part of the defendant, Henry Helstoski, derived from any source and for any purpose." *United States* v. *Helstoski*, No. 76-201 (D. N.J., Feb. 23, 1977) (pretrial order).

A.

The defendant challenges our jurisdiction over the Government's appeal. The Government asserts that we have jurisdiction over its appeal under 18 U.S.C. § 3731 (1976), which reads in pertinent part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

18 U.S.C. § 3731 (1976).

The defendant argues that since the district court's order did not suppress or exclude any specific items of evidence, it was not the type of order encompassed by the statute. Rather, defendant argues, the district court's ruling was a general delineation of the impact of the Speech or Debate clause on this prosecution. The defendant points to the failure of the district court to rule on any of the 23 offers of proof made by the Government as evidence that the district court simply was applying the principles of the Speech or Debate Clause and not excluding or suppressing evidence.

We note at the outset that § 3731 explicitly provides that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." 18 U.S.C. § 3731 (1976). And as we recognized in *United States* v. *Beck*, 483 F.2d 203 (3d Cir. 1973), *cert. denied*, 414 U.S. 1132 (1974), the legislative history of the current version of § 3731 "states specifically, 'The phrase "suppressing or excluding evidence or requiring the return of seized property" should be read broadly.' " *Id.* at 206, *quoting S. Rep. No.* 91-1296, 91st *Cong.*, 2d *Sess.* 37 (1970).

In *Beck*, the Government appealed from a district court decision holding that a magistrate erred in not suppressing certain evidence, and remanding for further proceedings before the magistrate consistent with that holding. The defendant argued that we had no jurisdiction over the appeal under § 3731, since the district court's remand order itself did not suppress or exclude evidence.

Stressing that "[t]he practical effect of the decision . . . is to suppress the evidence," and relying on the "congressional mandate that a 'suppression order' be liberally construed," we held that § 3731 gave us jurisdiction to hear the appeal. *Id.*

> [W]e think allowing jurisdiction over this appeal is in harmony with the congressional purpose to permit appeals except where an ongoing trial would be interrupted.

Id.

In light of the congressional intent that we recognized in *Beck* that § 3731 be liberally construed, as well as in light of the statute's specific command, we believe the district court's order in this case fairly may be characterized as one "suppressing or excluding evidence." The practical effect of the district court's order is to prevent the Government from introducing evidence of defendant's past legislative acts that it otherwise almost certainly would have introduced at trial. Section 3731 was designed to allow appeals from such orders to insure that prosecutions are not unduly restricted by erroneous pretrial decisions to exclude evidence.

Our holding is consistent with the approach to § 3731 taken by other Courts of Appeals in analogous situations. For example, in *United States* v. *Flores*, 538 F.2d 939 (2d Cir. 1976), the Government appealed under § 3731 from an order of the district court construing an extradition order of a foreign government. The district court read the order as

prohibiting proof at trial of any acts or statements of the defendant's alleged co-conspirators if those acts or statements occurred prior to a certain date specified in the extradition order.

The defendant attacked the jurisdiction on appeal of the Court of Appeals. He argued that the order below "did not constitute a suppression or exclusion of evidence within the meaning of § 3731 but instead 'involved an order delineating the permissible scope of acts for which [the defendant] could be prosecuted.' " *Id.* at 943, *quoting* Brief for Appellee at 10.

The appellate court, however, held that § 3731 conferred jurisdiction to hear the appeal. The court noted that the Government sought to introduce the evidence that the district court believed to be prohibited by the extradition order to prove the existence of a conspiracy during a subsequent period.

> The district court's orders, therefore, necessarily constitute evidentiary rulings that determine the manner in which such a crime may be proven. Section 3731 expressly affords jurisdiction in such an instance.

Id. Accord, United States v. *Battisti*, 486 F.2d 961, 965-67 (6th Cir. 1973); *see United States* v. *Craig*, 528 F.2d 773, 774, *cert. denied*, 425 U.S. 973, *vacated and decided in banc without reference to this issue*, 537 F.2d 957 (7th Cir.) (in banc), *cert. denied*, 429 U.S. 999 (1976).

We have jurisdiction under 18 U.S.C. § 3731 to hear the Government's appeal.

B.

The Government argues that it should be permitted to introduce the private bills themselves and correspondence and conversations referring to defendant's legislative acts in order to prove the purpose of defendant in accepting the payments at issue.

In support of this contention, the Government argues that while the decision in *Brewster* forbids inquiry into the legislative process, it allows inquiry into the purpose for taking a bribe, even though that purpose is related to legislative acts. Since the Government seeks to introduce evidence of defendant's legislative acts solely to prove defendant's purpose in taking the bribe, and not in order to inquire into the legislative process itself, it believes *Brewster* permits the introduction of such evidence in this case.

Further, the government argues that correspondence and conversations of the defendant are not themselves legislative acts, and so are not protected by the Speech or Debate privilege. Accordingly, the Government believes it may use such correspondence and conversation to prove the defendant's purpose in accepting the bribes, notwithstanding that they contain references to past legislative acts.

We agree with the district court that the Government misconstrues the meaning of the Speech or Debate Clause as set out in *Brewster*. It is true that *Brewster* did not foreclose the showing of the purpose in taking the bribe. But the Supreme Court in *Brewster* made it clear that such purpose could be

shown without inquiry "into how [defendant] spoke, how he debated, how he voted, or anything he did in the chamber or in committee." *United States* v. *Brewster*, 408 U.S. 501, 526 (1972).

> Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527.

Indeed, in responding to fears expressed by the dissenters that it had gone too far in cutting back the Speech or Debate privilege, the Court emphasized that proof of legislative acts not only was not required under § 201(c), but was forbidden: "our holding in [*United States* v.] *Johnson precludes any showing* of how he acted, voted, or decided." *Id.* at 527 (emphasis added).

> The dissenting opinion stands on the fragile proposition that it "would take the Government at its word" with respect to wanting to prove what we all agree are protected acts that cannot be shown in evidence. Perhaps the Government would make a more appealing case if it could do so, but here, as in that case, evidence of acts protected by the [Speech or Debate] Clause is inadmissible.

Id. at 527-28.

In so holding, the Court in *Brewster* was relying on its earlier opinion in *United States* v. *Johnson*, 383

U.S. 169 (1966). There the Court allowed retrial of the conspiracy count at issue only upon the condition that the Government produce no evidence of any legislative acts. "With all references to [defendant's speech on the floor] eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause." *Id.* at 185.

Like the district court, we do not read *Johnson* and *Brewster* as prohibiting proof of legislative acts only where evidence of such acts is introduced as part of an inquiry into the legislative process itself. The Court has been clear in its prohibition of "any showing" of legislative acts, *United States* v. *Brewster*, 408 U.S. 501, 527 (1972), just as the Clause itself prohibits inquiry into "any speech or debate." Legislative acts may not be shown in evidence for any purpose in this prosecution.

Nor may the Government circumvent this clear requirement by introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts of the defendant. To allow a showing by such secondary evidence could render *Brewster's* absolute prohibition meaningless. The Government would be able to prove any legislative act simply by producing non-privileged evidence containing some reference to that act. To allow proof of legislative acts in such a manner would reduce drastically the effectiveness of the Speech or

Debate provision, and would discourage the dissemination to the public of information about legislative activities.

C.

Finally, the Government argues that it should be permitted to introduce evidence of the defendant's legislative acts on the ground that defendant waived his Speech or Debate privilege by testifying before the grand jury about legislative acts.

The district court found it unnecessary to decide whether the Speech or Debate privilege is waivable by an individual member. Because the court believed the Clause to be an important part of the Constitutional machinery insuring separation of powers, it assumed without deciding that defendant could waive his protection under the Clause, and then held that proper judicial deference to the legislative branch required that "a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts." *United States* v. *Helstoski*, No. 76-201, at 16 (D. N.J., Feb. 22, 1977) (unpublished opinion).

Though in the circumstances of this case the district court found that defendant was aware of his Speech or Debate privilege when he voluntarily testified about legislative acts before the grand jury, it held that the defendant had not expressly waived his

Speech or Debate rights in the manner the court believed required.

The Government maintains on appeal that the defendant possessed the power to waive his Speech or Debate privilege. Moreover, the Government argues that the district court erred in requiring an express waiver. Since the privilege is not related to the fairness of the criminal proceeding, the Government argues that a voluntariness standard should govern waiver. Alternatively, the Government believes the defendant waived his privilege even under the express waiver standard required by the district court.

The question of whether an individual senator or representative may waive his Speech or Debate privilege is an open one. The history of the privilege at common law is not conclusive on this point, and the American authorities conflict. *Compare Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808) *with T. Jefferson, Manual of Parliamentary Practice, reprinted in S. Doc. No. 92-1*, 92d *Cong.*, 1st *Sess.* 431, 442 (1971); *cf. Gravel* v. *United States*, 408 U.S. 606, 622 n.13 (1972); *United States* v. *Brewster*, 408 U.S. 501, 529 n.18 (1972).

Our view of the role played by the Speech or Debate Clause makes it unnecessary for us to decide this difficult and important question in this case. We agree with the district court that the Speech or Debate Clause's function as a protection for the legislative branch against encroachment by the executive

and judicial branches precludes a finding of waiver in the context of a criminal prosecution except where the member expressly forfeits his protection under the Clause for the purposes for which the Government seeks to use the evidence of his legislative acts.

The Government's attempt to analogize the Clause to other privileges where only a voluntariness standard is required misses the significance of the Clause. It is not a privilege against non-disclosure, as is the attorney-client privilege. Nor is it designed to insure the reliability of the evidence it protects, as does the rule preventing the introduction of coerced confessions. In each of those instances, voluntary waiver does not vitiate the purposes of the privilege. And a requirement of express waiver would not serve to further the policy underlying each privilege. *See In Re Grand Jury Proceedings (Appeal of Cianfrani)*, 563 F.2d 577, 584 (3rd Cir. 1977).

Nor is the Speech or Debate Clause analogous to the fourth amendment exclusionary rule. Voluntary consent to search is permissible because that lesser standard does not work against the policy aims of the rule, i.e., the deterrence of police conduct that violates the fourth amendment.

The Speech or Debate Clause is designed "to protect the integrity of the legislative process [and insure] the independence of individual legislators" by prohibiting the introduction into evidence of legislative acts. *United States* v. *Brewster*, 408 U.S. 501, 507 (1972). To empower the judicial branch to find

waiver upon any showing of less than an express relinquishment of the privilege would be in conflict with this purpose by creating the potential for judicial and executive encroachment on constitutionally protected legislative prerogatives in situations where the waiver of such prerogatives is not made expressly clear.

Out of deference, then, to a co-equal branch of government, we hold that even if an individual member may waive his Speech or Debate privilege—a question we do not decide—any waiver in the context of a criminal prosecution must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member.

On the facts of this case we find no such waiver. The Government argues that the defendant's decision to testify and produce documents after receiving general warnings that he had the right to refuse to answer incriminating questions, and after receiving warnings that his statements were being recorded for possible use against him, constitutes the requisite express waiver. We disagree. At no time did the defendant expressly waive his right under article I, section 6, the Speech or Debate Clause, to be free from inquiry into his legislative acts in this case.

III.

CONCLUSION

The defendant's petition for a writ of mandamus will be denied.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1423

UNITED STATES OF AMERICA, APPELLANT

vs.

HELSTOSKI, HENRY

(D. C. Criminal No. 76-201-1)

On Appeal from the United States District Court for the District of New Jersey

Present: SEITZ, *Chief Judge* and STALEY and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on October 6, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 28, 1977, be, and the same is hereby affirmed.

ATTEST:

/s/ Thomas F. Quinn
Clerk

April 13, 1978

Certified as a true copy and issued in lieu of a formal mandate on July 10, 1978.

TEST: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1423

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY HELSTOSKI, APPELLEE

(D.C. Crim. No. 76-201-1, D. of N.J.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, STALEY, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Chief Judge

Dated: June 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1800

HENRY HELSTOSKI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

HONORABLE H. CURTIS MEANOR,
NOMINAL RESPONDENT

(D.C. Crim. No. 76-201-1, D. of N.J.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, STALEY, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Chief Judge

Dated: June 30, 1978

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 76-201

UNITED STATES OF AMERICA, PLAINTIFF

v.

HENRY HELSTOSKI, et al., DEFENDANTS

OPINION

Appearances:

Jonathan L. Goldstein, Esq.
United States Attorney
Attorney for Plaintiff

BY: Bruce I. Goldstein, Esq.
Robert Beller, Esq.
Peter B. Bennett, Esq.
Barry Ted Moskowitz, Esq.
Assistant United States Attorneys

Morton Stavis, Esq.
Louise A. Halper, Esq.
Paul Casteleiro, Esq.
Attorneys for Defendant Helstoski

Nicholas Gigante, Esq.
Attorney for Defendant Mazella

BY: Michael Miggiano, Esq.

MEANOR, District Judge.

Prior to the scheduled trial date of February 15, 1977 defendant Helstoski moved to dismiss Counts I, II, III and IV of the indictment.[1] Count I charges him, as a Congressman of the United States, with a conspiracy to solicit or receive bribes in return for his "being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives," in violation of 18 U.S.C. § 371. In connection with Count I, overt acts 2, 11, 13 and 16 allege the actual introduction of such bills. Counts II, III and IV charge the crime of seeking or accepting bribes in exchange for being influenced with respect to the introduction of private immigration bills, in violation of 18 U.S.C. § 201(c). Each of these substantive bribery counts contains a reference to the introduction of such bills.

The motion to strike the first four counts is based upon Article I, Section 6 of the Constitution of the United States which provides in pertinent part: "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place."

The defendant's position is that since the Speech or Debate Clause precludes inquiry by a grand jury into the performance of his legislative acts, and since

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[1] The scheduled trial was to be of Counts I through VI and XI and XII of a twelve count indictment. As a result of an opinion dated October 5, 1976, Counts VII through X were severed for later disposition. The counts that were to be tried on February 15 involved only Helstoski and did not contain charges against his codefendants.

the grand jury obviously made such an inquiry, the implicated counts of the indictment are vitiated. The Government contends that an indictment, valid on its face, is not subject to attack on the ground that incompetent or privileged evidence was presented to the indicting grand jury. In the alternative, the Government argues that the defendant waived his Speech or Debate rights by testifying without objection about his legislative acts before the grand jury, and during a prior trial in this court of one Albert DeFalco, who is alleged in Count I to be Helstoski's co-conspirator. This waiver, the Government contends, precludes Helstoski from attacking the validity of the indictment, and renders evidence of his legislative acts admissible at trial for the purpose of establishing his guilt.[2]

As will be seen, I can accept none of the arguments in toto. I come to the conclusion that dismissal of Counts I through IV of the indictment is not required. I also conclude that Helstoski has not waived his rights pursuant to the Speech or Debate Clause and, consequently, the Government may not introduce during its case-in-chief evidence, derived from any

[2] In addition, the Government also contends that even if it cannot use evidence of Helstoski's performance of legislative acts in its case-in-chief to prove overt acts done in furtherance of the conspiracy charged in Count I, or to corroborate the existence of the bribes charged in Counts II through IV, it may use such evidence on subsidiary questions such as intent and motive, or as part of the res gestae.

source, concerning the performance of a legislative act by Congressman Helstoski.[3]

[3] The parties were informed of these conclusions on February 1, 1977 during an in camera pretrial conference. At that time, I stated that a formal opinion would be issued after the trial jury was selected and sequestered. Such preliminary notification was essential in order that the Government could prepare and structure its case accordingly. The issuance of an opinion prior to selection of the jury would have compounded an already complex issue of jury selection. This case has received, and continues to receive, considerable publicity. Issuance of this opinion before jury selection would have engendered publicity regarding the actual introduction of the bills which the indictment charges were the result of bribes. Dissemination of such information on the eve of trial undoubtedly would have enlarged excusals for cause, since such evidence may not be used by the Government in its case-in-chief. After receiving notice of the decision, the Government made known its intention to take an interlocutory appeal pursuant to 18 U.S.C. § 3731, and asked for oral argument and an opportunity to make a more complete record. This request was granted, and the argument held on February 14. Since the issues presented are of constitutional moment, not only for this case but far beyond it, I did not wish to deprive the Government of what might have been its only opportunity to secure appellate review. This is not to intimate any view on my part that the order authorized by this opinion is subject to interlocutory review under 18 U.S.C. § 3731. That is a matter that should be addressed in the first instance to the Court of Appeals. I do note, however, that the Seventh Circuit in *United States* v. *Craig*, 528 F.2d 773 (7th Cir.), reversed on other grounds, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 45 U.S.L.W. 3416 (1976), accepted without discussion an interlocutory appeal under 18 U.S.C. § 3731 from an order highly similar to the order that will be entered as a result of this opinion.

I

Defendant Helstoski's contention that Counts I through IV of the indictment must be dismissed because the indicting grand jury heard evidence regarding his legislative acts is untenable. *United States* v. *Johnson*, 419 F.2d 56 (4th Cir. 1969). This is not because there is any question that a member of Congress may not be called to answer for his legislative acts before a grand jury, *Gravel* v. *United States*, 408 U.S. 606 (1972), but because courts simply will not go behind the face of an indictment, once it is returned, in order to test the competency of the evidence adduced before the grand jury. *United States* v. *Calandra*, 414 U.S. 338 (1974); *Lawn* v. *United States*, 355 U.S. 339 (1958); *Costello* v. *United States*, 350 U.S. 359 (1956); *Holt* v. *United States*, 218 U.S. 245 (1910); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966) (dictum). This rule governs whether the evidence before the grand jury is attacked on the ground it is hearsay, *United State* v. *Costello*, supra, or on the ground the evidence was obtained and set before the grand jury in violation of the Constitution, *United States* v. *Calandra*, supra; *Holt* v. *United States*, supra; *United States* v. *Blue*, supra. As the Supreme Court noted in *Costello*, the absence of such a rule would occasion impermissible delays in reaching the merits of criminal cases because defendants could routinely insist on a preliminary trial of the validity of the indictment. Accordingly, the court held that "[a]n indictment returned

by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States*, supra, 350 U.S. at 363. The Supreme Court reiterated in *Calandra* that "the validity of an indictment is not affected by the character of the evidence considered [by the grand jury]." *United States* v. *Calandra*, supra, 414 U.S. at 344-45. This being the case, I find the four counts of the instant indictment to be immune from attack on the ground that the indicting grand jury heard constitutionally impermissible evidence.

II

Defendant's assertion that the first four counts of the indictment are invalid because of their express reference to Helstoski's performance of legislative acts can be answered without reference to the Government's argument of waiver.

In two recent cases the Supreme Court was confronted with application of the Speech or Debate Clause in the context of a criminal prosecution. In *United States* v. *Johnson*, 383 U.S. 169 (1966), the defendant was indicted for conspiring to defraud the United States and for violating federal conflict of interest legislation. The criminal acts of which he was accused took place while Johnson was serving as a member of the House of Representatives. The conspiracy count on which he was convicted alleged an agreement among Johnson and his codefendants

to obtain the dismissal of indictments against officers of a savings and loan association by exerting influence upon the Department of Justice. This court expressly alleged that Johnson had, in furtherance of the conspiracy, delivered a speech on the floor of the House favorable to independent savings and loan associations. See *United States* v. *Johnson*, 215 F.Supp. 300, 304 (D. Md. 1963). At trial, various witnesses, including Johnson, were questioned extensively concerning the authorship of the speech, its content, and Johnson's motives for giving it. Johnson and his codefendants were convicted. The Fourth Circuit set aside Johnson's conviction on the conspiracy count as violative of the Speech or Debate Clause. *United States* v. *Johnson*, 337 F.2d 180 (4th Cir. 1964). The Supreme Court affirmed because (1) the conspiracy conviction had been obtained through use of evidence of Johnson's legislative act in delivering the speech and the underlying motive for performing that act, and (2) the Government's conspiracy theory depended on a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith. The Court held that a prosecution under a general criminal statute dependent on inquiries into the legislative acts of a member of Congress, or his motives for performing them, of necessity contravenes the Speech or Debate Clause. 383 U.S. at 184-85. The Court carefully circumscribed its holding, however, stating that its decision did not touch a prosecution where such matters are not drawn into question, *id.*

at 185, and that the Clause does not reach "conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." *Id.* at 172. The court thus disapproved of that portion of the Circuit Court's opinion which it read as dismissing the conspiracy count in its entirety. The Court stated:

> The making of the speech . . . was only a part of the conspiracy charge. With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.

Id. at 185. The case was then remanded to the district court for retrial.

A similar result was reached by the Supreme Court in *United States* v. *Brewster*, 408 U.S. 501 (1972), in which the Court, in light of *Johnson*, again held that the Speech or Debate Clause created no bar to the prosecution of a member of Congress as long as the Government's case does not include proof of a legislative act, or the motive for performing such an act. In *Brewster*, a former United States Senator was charged in four counts of an indictment with seeking or receiving bribes in return for being influenced in the performance of certain official acts. 18 U.S.C. § 201(c). In a fifth count, he was charged with the solicitation or receipt of an illegal gratuity in return for his past performance of a particular

legislative act. 18 U.S.C. § 201(g). Like the conspiracy count in *Johnson*, the gratuity count in *Brewster* made direct reference to a legislative act.

The Court rejected Brewster's contention that the indictment violated the Speech or Debate Clause. With respect to the bribery counts, the Court explained:

> The question is whether it is necessary to inquire into how [Brewster] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of [the bribery] statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that [Brewster] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Id. at 526. If the Government were able to make a prima facie case under the statute without adducing the constitutionally impermissible evidence, Brewster could be required to stand trial on the bribery charges. *Id.* The Court similarly upheld the validity of the illegal gratuity count:

> Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that [Brewster] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527.

I believe that *Johnson* and *Brewster* compel the conclusion that Counts I through IV of the instant indictment are not violative of the Speech or Debate Clause merely because they make reference to alleged legislative acts of defendant Helstoski. Inquiry into the legislative performance of Helstoski is not essential to a prima facie showing that Helstoski was a participant in the criminal conspiracy charged in Count I, or that he sought or received bribes as charged in Counts II through IV. This is sufficient to sustain the validity of these counts, notwithstanding their reference to legislative acts of Helstoski.

III

As the foregoing discussion of *Johnson* and *Brewster* shows, it is beyond dispute that prosecutorial use of evidence of the performance of legislative acts by a congressman as proof of his guilt of a federal crime conflicts squarely with the command of the Speech or Debate Clause. The Government here concedes two self-evident propositions. It agrees that Helstoski's introduction of private immigration bills constituted legislative acts. It also agrees that Helstoski's November 1976 defeat and his present status as an ex-congressman have no effect upon the assertion of his rights under the Speech or Debate

Clause. It insists, however, that Helstoski, by voluntarily testifying before the grand jury and at the trial of Albert DeFalco about his introduction of private immigration bills, has waived his rights under the Speech or Debate Clause, thus enabling the Government to introduce evidence of such acts at trial.[4] In further support of the waiver thesis, the Government points to its evidence of Helstoski's reference to his introducation of private immigration bills in correspondence with the persons who were the subject thereof, their attorneys and others. The Government also has evidence of Helstoski's recital of his past performance of these legislative acts in conversations with others. It makes no difference that the primary reliance of the Government is upon Helstoski's voluntary testimony about his past legislative acts during his appearances before the grand jury and at the DeFalco trial, rather than upon his correspondence and conversations. These are simply a recital of the contexts in which Helstoski made prior voluntary disclosure of his past performance of legislative acts outside the House and they all present different facets of the same argument—that by such prior voluntary disclosure Helstoski waived his rights pursuant to the Speech or Debate Clause.

[4] It is clear that Helstoski was aware of the Speech or Debate Clause at the time he made his first grand jury appearance. He had recently concluded litigation involving his franking privilege in which he had relied upon the Speech or Debate Clause. *Schiaffo* v. *Helstoski*, 350 F.Supp. 1076 (D.N.J. 1972), rev'd in part, aff'd in part and remanded, 492 F.2d 413 (3d Cir. 1974). In that litigation, Helstoski was represented by the same attorney who represented him throughout his grand jury appearances.

There can be no question but that Helstoski during his various grand jury appearances and in the DeFalco trial voluntarily testified in detail regarding his introduction of private immigration bills. He also supplied the Government with copies of the bills and with voluminous correspondence relating thereto. At no time until the present motion has he asserted any rights under the Speech or Debate Clause.

The Government takes the position that the Speech or Debate Clause confers upon a federal legislator a personal evidentiary privilege which may be waived in the same manner as other personal evidentiary privileges. Pointing to the above noted acts of the defendant, and taking pains to demonstrate the voluntariness of those acts, the Government concludes that the defendant has waived his Speech or Debate protections. The Government derives support for this position from a Seventh Circuit panel decision in *United States* v. *Craig*, 528 F.2d 773 (7th Cir.), rev'd on other grounds, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 45 U.S.L.W. 3416 (1976).

In *Craig*, a state legislator had consented to interviews with various federal officers and had testified under subpoena before a federal grand jury

investigating alleged corruption in the Illinois state legislature. Subsequently, the legislator was indicted for several federal offenses, and thereafter moved to suppress his grand jury testimony and statements he had given to Government agents on the ground that they had been obtained in violation of his federal and state Speech or Debate privileges. On appeal from the district court's order granting the motion to suppress, the majority of a three-judge panel first held that state legislators are entitled to a federal common law Speech or Debate privilege in federal criminal prosecutions, 528 F.2d at 779, and then addressed the question of whether the defendant's prior conduct constituted a waiver of that privilege.

The court perceived the Speech or Debate privilege to be analogous to privileges of confidentiality [5] which have generally been found to be waivable by voluntary conduct. In view of the fact that the defendant in *Craig* was knowledgeable in the workings of government, was represented by competent counsel, and had testified before the grand jury rather than rely on his privilege against self-incrimination of which he had been informed, the court concluded that the defendant had voluntarily waived his Speech or Debate privilege. It thus reversed the suppression order.

On rehearing en banc, the panel opinion was superseded. A majority of the court were of the opinion that no federal Speech or Debate privilege was

[5] As examples, the court cited cases which recognize the waivability of the attorney-client privilege, the marital privilege, and the physician-patient privilege. 528 F.2d at 780-81.

available to a state legislator in a federal criminal proceeding. *United States v. Craig*, 537 F.2d 957 (7th Cir.), cert. denied, 45 U.S.L.W. 3416 (1976). This conclusion, of course, rendered moot the panel discussion of the waiver issue.

While the Government has adopted the rationale of the *Craig* panel opinion in support of its waiver theory, the defendant resists this theory insisting that what the Speech or Debate Clause has created is not a personal privilege, but an institutional one. From this flows the conclusion that an individual congressman may not waive the privilege, i.e., if it is waivable at all, only the House of Representatives, as a body, can do so.

I find it unnecessary to reach the merits of defendant's position.[6] Assuming, without so holding, that

[6] Defendant's assertion that an individual congressman is without power to waive his Speech or Debate protection is not frivolous. Aside from defendant's argument that the Speech or Debate privilege is institutional and not personal, I believe the literal language of the Clause could be construed as placing a non-waivable constitutional barrier to a court's receipt of evidence of a member's legislative acts in a case in which his conduct is under scrutiny.

In support of its thesis that a federal legislator may waive his Speech or Debate privilege, the Government relies on the single instance in which the Supreme Court has mentioned the matter of waiver—a footnote in the court's opinion in *Gravel* v. *United States*, 408 U.S. 606 (1972).

In *Gravel*, the Court held that legislative aides were within the protection of the Speech or Debate Clause for their performance of acts that would be so protected if performed by the legislator himself. It then held that the legislator could waive his aide's Speech or Debate immunity. 408 U.S. at 622 n.13. From this, the Government concludes that the legislator

the Speech or Debate Clause affords certain rights which attach to a congressman, as an individual, and not to the House of Representatives, as an institution, I am unable to find that Helstoski has *waived those rights on the* facts of this case.

The central proposition underlying the position of the Government and the conclusion of the *Craig* panel is that the Speech or Debate Clause creates an evidentiary privilege akin to those generally recognized at common law and which frequently have now been codified by statute or court rule. I find this proposition to be at odds with the source and purpose of the Speech or Debate Clause, and believe that adherence to this notion renders the Clause incapable of achieving the purpose for which it was designed.

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may also waive for himself. In *Craig*, supra, the Seventh Circuit panel gave this same interpretation of *Gravel*. 528 F.2d at 780. It may be argued that this interpretation is not correct. By its literal terms, the Speech or Debate Clause applies only to legislators; it does not embrace their aides, although the court has included them within its compass in order to further the purpose of the Clause. There may thus be a constitutional difference between waiver of an aide's rights, which are afforded by judicial gloss, and waiver of a member's rights in light of the absolute language that "they [Senators and Representatives] shall not be questioned in any other place." This could be construed as placing a non-waivable constitutional barrier to receipt of evidence of a member's legislative acts in a case in which his conduct is under scrutiny. To accept this argument would be to answer in the negative a question posed and left open in both *Johnson* and *Brewster*. That question is whether the Congress constitutionally could empower the courts, through the medium of a narrowly drawn and specific statute, to receive evidence of a member's legislative acts in the course of a prosecution against him. It is not necessary to resolve that issue here.

The origin and purposes of the Speech or Debate Clause recently have been explored in depth, both by the Supreme Court [7] and commentators.[8] Its function is to insure the doctrine of separation of powers [9] by preventing executive and judicial encroachment upon legislative independence.[10] Subsidiary to this, the Clause prevents the other branches of government from distracting legislators from their duties by shielding them from the obligation to defend civil and criminal litigation calling into question their performance

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[7] *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe* v. *McMillan*, 412 U.S. 306 (1973); *Gravel* v. *United States*, 408 U.S. 606 (1972); *United States* v. *Brewster*, supra; *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *United States* v. *Johnson*, supra.

[8] Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 Suffolk L. Rev. 1019 (1974); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk L. Rev. 1 (1968); Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973); Comment, *Brewster, Gravel and Legislative Immunity*, 73 Colum. L. Rev. 125 (1973); Note, 4 Seton Hall L. Rev. 277 (1972); 11 Duq. L. Rev. 677 (1973); 27 Mercer L. Rev. 1195 (1976); 46 Miss. L. Rev. 1112 (1975); 26 Vand. L. Rev. 327 (1973); 75 Yale L. J. 335 (1965).

[9] *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881).

[10] *Eastland* v. *United States Servicemen's Fund*, supra, at 502; *Gravel* v. *United States*, supra, at 617; *United States* v. *Johnson*, supra, at 181.

of a legislative act: [11] "once it is determined that members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an *absolute* bar to interference." *Eastland* v. *United States Servicemen's Fund*, supra, at 503 (emphasis added).

In light of the history and purposes of the Speech or Debate Clause, the Government's characterization of its protection as providing nothing more than a personal evidentiary privilege is unacceptable. If that be so, then the waiver doctrines ordinarily applicable with respect to such privileges are not pertinent.

Evidentiary privileges have become part of our jurisprudence in order to give effect to the general policy consideration that the public derives greater benefit if certain classes of confidential communications remain protected from revelation, even at the cost of impeding the truth seeking process.[12] There

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[11] *Eastland* v. *United States Servicemen's Fund*, supra, at 503; *Dombrowski* v. *Eastland*, supra, at 85; *Powell* v. *McCormack*, supra, at 505.

[12] Professor Wigmore recognized four fundamental conditions to the existence of an evidentiary privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 Wigmore, Evidence, § 2285, at 527 (McNaughton rev. 1961) (emphasis in original) (footnote omitted).

can be no doubt that these privileges may be waived by voluntary conduct inconsistent with the underlying purpose of the privilege, such as the voluntary disclosure of the contents of the confidential communication to third parties.[13] The Government also seeks to analogize the Speech or Debate privilege to the Fifth Amendment's privilege against compulsory self-incrimination. This privilege exists in order to assure that admissions and confessions used against a criminal defendant are reasonably trustworthy and not the mere product of fear and coercion, and to prevent the Government from overcrowding the will of the defendant thus depriving him of the freedom to deny assisting the Government in securing his conviction.[14] Where a defendant voluntarily chooses to disclose information in the absence of coercion, the evils sought to be prevented by the privilege cannot arise. Therefore, here again a voluntary disclosure constitutes a waiver of the privilege.[15]

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[13] See, e.g., *United States* v. *Fisher*, 518 F.2d 836 (2d Cir.), cert. denied, 423 U.S. 1033 (1975) (waiver of marital privilege); *In re Horowitz*, 482 F.2d 72 (2d Cir.), cert. denied, 414 U.S. 867 (1973) (waiver of attorney-client privilege); *Bishop Clarkson Memorial Hosp.* v. *Reserve Life Ins. Co.*, 350 F.2d 1006 (8th Cir. 1965) (waiver of physician-patient privilege).

[14] *In re Gault*, 387 U.S. 1, 47 (1967).

[15] *Garner* v. *United States*, 424 U.S. 648 (1976).

The Speech or Debate Clause, however, was not designed to prevent public disclosure of a legislator's official acts. Normally those acts, like the introduction of private immigration bills at issue here, are matters of public record. It should be obvious that the Clause was not designed to insure the confidentiality of legislative acts, and, hence, the analogy to the personal evidentiary privileges is inappropriate to analysis of the Speech or Debate Clause. Furthermore, it should also be obvious that, unlike the Fifth Amendment's protection against self-incrimination, the Clause was not designed as a guarantee of the reliability of evidence of legislative acts, since those acts normally will be incontrovertible matters of public record. Thus, the analogy to the privilege against self-incrimination is also inapt.

The Supreme Court has recognized "the importance of informing the public about the business of Congress." [16] The Speech or Debate Clause would serve very little purpose if its protection were to be waived through reference by a legislator when outside the chamber to his past performance of a legislative act. To hold otherwise would be to force a legislator, in order to preserve his privilege, to refrain from reference to his legislative acts when outside the House. Obviously, such an inhibition upon dissemination of information about a member's legislative conduct is inconsistent with the political realities of our democratic system. It would be an absolute incongruity if

[16] *Doe* v. *McMillan*, 412 U.S. 306, 314 (1973).

a member when campaigning for reelection could speak of his past legislative performance only at the risk of waiving his Speech or Debate protection.

I find the conclusion inescapable that the Speech or Debate Clause does not create a mere evidentiary privilege. This conclusion is all the more compelled by the Supreme Court's holding in *Gravel* v. *United States*, supra, that while a legislator has Speech or Debate rights when his acts are called into question, he has no such rights when called to testify concerning third-party crime.[17] This being the case, doctrines surrounding the utilization and waiver of evidentiary privileges are not rationally applicable to the Speech or Debate Clause. I do not believe that a waiver of a congressman's Speech or Debate rights may be predicated on the mere showing of a voluntary disclosure of his past performance of a legislative act when outside the legislative chamber.[18]

Again, the purpose of the Speech or Debate Clause is to insulate the independent activities of the legislature from executive and judicial interference. This purpose can be achieved only if the executive is barred from utilizing evidence of legislative acts, and if the judiciary refuses to receive evidence of such acts, in

[17] *Gravel* v. *United States*, 408 U.S. 606, 628-29 (1972). The Government does not so construe *Gravel*. I agree, however, with the construction of the majority opinion given by Justice Stewart, dissenting in part. See *id.* at 630.

[18] Nor does it make any difference in what context that prior disclosure was made—whether it be before a grand jury, a petit jury in a criminal action against another, in speeches, correspondence or conversations.

a criminal prosecution of a legislator. I therefore believe that what the Speech or Debate Clause does is to erect an absolute constitutional immunity in favor of a member of Congress from having evidence of his legislative acts used in litigation against his interests. I am not certain whether a member of Congress has the power to waive this immunity.[19] But I am certain that if such power exists, it is consistent with the constitutional obligation of the judiciary to eschew interference with the legislature that the courts employ a stringent test before finding such a waiver in a given case. A waiver of the Speech or Debate immunity ought not be found by implication. Such a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts. A less stringent standard would vitiate the prophylactic purpose underlying the Speech or Debate Clause. It is clear that by the above standard, Helstoski has not waived his Speech or Debate immunity from having evidence of his prior legislative acts used against him in the instant criminal prosecution. Accordingly, such evidence may not be admitted at trial on the ground of waiver.

[19] See note 6, supra.

IV

After receiving in camera notice of the essentials of the ruling on the Speech or Debate issue,[20] the Government filed a motion, with supporting brief, seeking a pretrial ruling on the admissibility of 23 offers of proof set forth in its notice of motion.

It is not necessary to rule upon each of the 23 offers.[21] From what has been said in Part II of this opinion in discussing *Johnson* and *Brewster*, it is clear that the Speech or Debate Clause creates no impediment to the introduction of evidence of an agreement by Helstoski to perform *in futuro* a legislative act. What is forbidden is the introduction of evidence of his past performance of such an act.

The Government argues, however, that Helstoski's statements, both verbally and in writing, referring to the introduction of private immigration bills, do not constitute legislative acts and thus may be admitted. The argument is beside the point. The offered evidence contains reference to Helstoski's past performance of a legislative act, and the Speech or Debate Clause forbids use of such evidence during the

[20] See note 3, supra.

[21] The defendant contends that it would be improper to rule on the Government's offers of proof in advance of trial. He further objects to such a ruling on the ground that the offers of proof are couched in the form of statements by the Government. He claims that if such pretrial rulings are to be made, an evidentiary hearing is required in order to force the Government to place its offers of proof under oath.

Government's case-in-chief.[23] The same is true of the thesis that Helstoski's statements reciting the past performance of a legislative act may be used, not to corroborate the existence of a bribe, but on issues such as motive, intent, knowledge and the like.[24] This ignores the absolute command of the Speech or Debate Clause as construed and applied in *Johnson* and *Brewster*. The Clause does not say that evidence of a legislator's past performance of a legislative act may be used against him for some purpose but not others. It is, rather, that such evidence may not be used at all.[24] If the Government, for whatever reason

[23] I say case-in-chief because it is conceivable that events could occur at trial that would lead to limited use of such evidence. For examples of the use of otherwise excluded evidence on a credibility issue after the defendant "opened the door," see *Harris* v. *New York*, 401 U.S. 22 (1971) and *Walder* v. *United States*, 347 U.S. 62 (1954).

[24] The Government also says that Helstoski's statements containing a recital of his past performance of a legislative act are admissible as part of the res gestae on the ground that such statements are part of the felonious agreement. I take it that the Government means, at least in some instances, that such admissions by Helstoski are so intertwined with other statements by him that his references to the performance of legislative acts cannot be separated from the context. The above discussion is designed to dispose of this argument as well.

[24] In *Johnson*, the Supreme Court permitted the defendant to be tried on the conspiracy count only "[w]ith *all references* to [Johnson's legislative act] omitted." *United States* v. *Johnson*, supra, 383 U.S. at 185 (emphasis added). In *Brewster*, the court permitted the defendant to be tried on the bribery and illegal gratuity counts, but reiterated "our holding in Johnson precludes *any showing* of how [Brewster] acted,

cannot prove its case without reference to Helstoski's past performance of a legislative act, then the prosecution will have to be foregone.

This decision does not mean that congressmen are "super-citizens, immune from criminal responsibility." [25] They are as susceptible as any citizen to enforcement of the criminal laws, providing that the prosecution can proceed without calling into question their legislative acts. Nor does it mean that congressmen are constitutionally immune from any punishment where it is necessary to call into question their legislative acts in order to impose it.

"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. Const., Art. 1, sec. 5, cl. 2.

Nearly a century ago, the Supreme Court said:

> [T]he Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey

voted, or decided." *United States* v. *Brewster*, supra, 408 U.S. at 527 (emphasis added). I can find no leeway in the Supreme Court's position on the inadmissibility of evidence of legislative acts in a criminal proceeding against a member of Congress to permit such evidence to be introduced in the instant case for some purposes and not for others during the Government's case-in-chief.

[25] *Brewster*, supra, 408 U.S. at 516.

some rule on that subject made by the House for the preservation of order.[26]

The Speech or Debate Clause expressly permits a member to be called into question before the House on account of his performance of a legislative act. If the House does not exercise the power conferred by the Constitution to discipline its own members, such a failure provides no basis for the executive and the judiciary to interfere, ignore the Constitution, and violate the doctrine of separation of powers.

For the reasons stated, an order will be entered denying the defendant's motion to dismiss Counts I through IV of the indictment. The order shall also provide that the Government may not, during its case-in-chief, introduce evidence, derived from any source and for any purpose, of the past performance of a legislative act by defendant Henry Helstoski.

Counsel for the Government shall present an order in conformity with this opinion, with consent to the form thereof annexed, at the earliest possible time.

DATED: February 18, 1977.

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[26] *Kilbourne* v. *Thompson*, *supra*, 103 U.S. at 189-190.

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